No. 80-317

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNIVERSITY OF TEXAS, *et al.*,
Petitioners,

v.

WALTER CAMENISCH,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE
TO FILE BRIEF AND

BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

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MOTION OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL FOR LEAVE TO SUBMIT BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (EEAC) moves this Court for leave to file the accompanying brief as Amicus Curiae supporting the petitioners, the University of Texas, *et al.*, in this case. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized to promote the common interest of employers and the general public in sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and in-

dustry associations. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. In addition, most of EEAC's members are federal contractors subject to Section 503 of the Rehabilitation Act, 29 U.S.C. § 793, which unlike Section 504, requires affirmative action "to employ and advance in employment qualified handicapped individuals." Despite the significant differences in Sections 504 and 503, the Court's resolution of the jurisdictional and substantive issues in this case will influence the resolution of similar issues under Section 503.

3. Accordingly, EEAC's members have a direct interest in the issues presented for the Court's consideration, including: (1) whether private individuals may bring suit under Section 504 without first showing that they are participants in programs in which they were the intended beneficiaries of federal financial assistance and that they have exhausted administrative remedies; and (2) whether Section 504 requires institutions and employers receiving financial assistance to take positive steps to accommodate otherwise qualified handicapped persons.

4. Because of its interest in issues involving the private right of action under our civil rights laws, EEAC filed a brief as Amicus Curiae in this Court in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361 (1979); and *Cannon* v. *University of Chicago*, 99 Sup. Ct. 1946 (1979). On numerous other occasions, EEAC has filed briefs as amicus curiae. *See, e.g., International*

Brotherhood of Teamsters v *United States*, 431 U.S. 324 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Great American Federal Savings & Loan Association* v. *Novotny*, 99 Sup. Ct. 2345 (1979).

5. The written consent of counsel for the petitioners to the filing of this brief has been filed with the Clerk of the Court. Counsel for the respondent indicated that he would not consent, thereby necessitating this motion.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief amicus curiae in this case.

Respectfully submitted,

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BRIEF AMICUS CURIAE FOR THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICUS CURIAE [1]

The Council is a voluntary nonprofit association composed of employers and trade associations. Many of EEAC's members participate in federally subsidized programs and therefore are subject to the nondiscrimination provisions of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Accordingly, EEAC's members have a direct interest in the issues presented for the Court's consideration; that is, (1) whether private in-

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[1] The interest of the amicus curiae Equal Employment Advisory Council is set forth in greater detail above in the motion for leave to file a brief as amicus curiae.

dividuals may bring suit under Section 504 without showing that they are participants in programs in which they were the intended beneficiaries of financial assistance and that they have exhausted administrative remedies; and (2) whether Section 504 requires institutions and employers receiving financial assistance to take positive steps to accommodate otherwise qualified handicapped persons.

SUMMARY OF ARGUMENT

The legislative history of the Rehabilitation Act of 1973 and its two amendments shows that Congress did not intend to create a right of action under Section 504 for private individuals against recipients of federal financial assistance prior to an administrative determination. In order for an otherwise qualified handicapped individual to have standing under Section 504 to seek review of an agency determination, the complainant must have been the intended beneficiary in a program receiving federal funds and have exhausted his administrative remedies. Because resolution of handicap discrimination complaints are substantially more complex than those involving race, sex, or national origin, exercise of administrative expertise by the funding agency is a necessary predicate to judicial review.

Section 504, which merely proclaims a policy of nondiscrimination, does not require recipients to undertake costly accommodations for the handicapped. *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361, 2369 (1979). Because there is no "accommodation" language in the statute in question, no such accommodations are required and even if such an obligation exists, Section 504 requires that recipients incur no more than *de minimis* costs to comply. To require more would be at odds with this Court's decision in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977).

ARGUMENT

I. SECTION 504 DOES NOT CREATE AN ADDITIONAL PRIVATE RIGHT OF ACTION BEYOND THE RIGHT TO SEEK JUDICIAL REVIEW OF AN ADVERSE AGENCY ACTION.

A. The Legislative History of the Rehabilitation Act of 1973 and Its Two Amendments Does Not Support an Implication of a Right of Action Under Section 504 for Private Individuals Against Recipients of Federal Funds Prior to an Administrative Determination.

The question of whether a statute creates a cause of action, expressly or by implication, is essentially a matter of statutory construction. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 100 Sup. Ct. 242, 245 (1979); *Touche Ross & Co.* v. *Redington*, 99 Sup. Ct. 2479, 2485 (1979); and *Cannon* v. *University of Chicago*, 99 Supp. Ct. 1946, 1953 (1979). "[T]he fact that a federal statute may have been violated and some person harmed does not automatically give rise to a private cause of action in favor of that person." *Touche Ross*, 99 Supp. Ct. at 2485; and *Cannon*, 99 Sup. Ct. at 1953. Rather, as recognized in recent decisions of this Court, the central inquiry in such cases is whether it is clear that Congress intended to create the private remedy asserted.[2] *Transamerica*, 100 Sup. Ct. at 245; and *Touche Ross*, 99 Sup. Ct. at 2489. *Cf. Cannon*, 99 Sup. Ct. at 1975 (Powell, J., dissenting) ("Absent the most compelling evidence of af-

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[2] In *Cannon*, the Court implied a private right of action under Title IX of the Education Amendments of 1972, relying on the four factor test in *Cort* v. *Ash*, 422 U.S. 66 (1975). Since that decision, this Court has adopted a stricter standard in deciding questions of private rights of action and has determined that the four *Cort* factors standing alone do not justify the implication of a private right of action. *Transamerica*, 100 Sup. Ct. at 249 ("The dispositive question remains whether Congress intended to create any such remedy. Having answered that question in the negative our inquiry is at an end."); and *Touche Ross*, 99 Sup. Ct. at 2489.

firmative congressional intent, a federal court should not infer a private course of action.")

Section 504 as enacted in 1973 does not explicitly create a right for anyone to bring suit in federal court. Moreover, the only contemporaneous legislative history is one sentence which refers to the provision as a mere policy proclamation.[3] This characterization is not surprising because the Rehabilitation Act of 1973 was not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped individuals—especially the severely handicapped—and developing new programs to assist in their assimilation into society. It was enacted primarily to improve the states' delivery of vocational rehabilitation services to handicapped individuals.

In sum, Section 504 stood alone within the Rehabilitation Act of 1973 unaccompanied by any implementation provisions. No authority was delegated to any agency to promulgate or enforce regulations under the Act. These omissions are in contrast with the language of Section 503 of the Rehabilitation Act, which contained provisions mandating the promulgation of regulations and the establishment of a complaint procedure within the Department of Labor. 29 U.S.C. § 793. Thus, no private right of action can be inferred under Section 504 because no rights to administrative process or other action was evidenced by the statute.

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[3] S. Rep. No. 93-318, 93d Cong., 1st Sess., *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2076, 2123, stated: "The bill further incudes a provision proclaiming a *policy* of nondiscrimination against otherwise qualified handicapped individuals with respect to participation in or access to any program which is in receipt of Federal financial assistance." (Emphasis added.) *See Snowden* v. *Birmingham-Jefferson County Transit Authority*, 407 F.Supp. 394, 397 (N.D. Ala. 1975), *aff'd*, 551 F.2d 862 (5th Cir. 1977).

1. *The 1974 Amendments.*

Notwithstanding this contemporaneous legislative history indicating that Section 504 was no more than a policy statement, numerous courts between 1973 and 1978 concluded that Section 504 authorizes a private right of action. All of the courts of appeals that reached this conclusion, including the court below, have based their decisions on the *Cort* analysis of the Seventh Circuit in *Lloyd* v. *Regional Transportation Authority*, 548 F.2d 1277, 1284-1287 (7th Cir. 1977).[4]

In *Lloyd*, the court relied heavily on the legislative history of the 1974 amendments to the Rehabilitation Act, which amended the definition the "handicapped individual" but did not in any way modify Section 504. Although the Act was amended for this limited purpose, the report written to support overriding the presidential veto of the 1974 amendments included language which extended beyond the scope of the amendments and attempted to clarify Congress' intent in 1973 regarding Section 504. Specifically, the Senate Committee report stated that: (1) Section 504 was patterned after the nondiscrimination language pertaining to recipients of federal financial assistance in Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (Title VI), and

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[4] *See N.A.A.C.P.* v. *Medical Center, Inc.*, 599 F.2d 1247, 1258 (3d Cir. 1979); *Davis* v. *Southeastern Community College*, 574 F.2d 1158, 1159 (4th Cir. 1978); *United Handicapped Federation* v. *Andre*, 558 F.2d 413, 415 (8th Cir. 1977); *Kampmeier* v. *Nyquist*, 553 F.2d 296, 299 (2d Cir. 1977); and *Leary* v. *Crapsey*, 566 F.2d 863, 865 (2d Cir. 1977). Significantly, in *Simpson* v. *Reynolds Metals Co.*, 629 F.2d 1226, 1229 (7th Cir. 1980), the Seventh Circuit stated that the assumption by other courts that it implied a private right of action under Section 504 in *Lloyd* "may reflect an oversimplified view of that case and ignores the limitations we there expressed." The court in *Lloyd* found a private right of action solely on the basis that at the time of its decision there did not exist remedial administrative procedures under Section 504. See pp. 7-8, *infra*.

Section 901 of the Education Amendments of 1972, 20 U.S.C. § 1681 (Title IX); (2) although not specifically required by Section 504, regulations were to be promulgated; and (3) the enforcement provisions of Section 504 were to be patterned after the implementing regulations of Title VI, 45 C.F.R. Parts 80 and 81, and Title IX, 45 C.F.R. Part 86. S. Rep. No. 93-1297, 93d Cong., 2d Sess. 39-40 (1974).

In contrast to the weight accorded to this legislative history in *Lloyd* by the Seventh Circuit, this Court in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361 (1979), stated that this committee report, "made after the enactment of the statute under consideration [Section 504], cannot substitute for a clear expression of legislative intent at the time of enactment (citations omitted)." 99 Sup. Ct. at 2370 n.11. Moreover, "[n]or do these comments, none of which represents the will of Congress as a whole, constitute subsequent 'legislation' such as this court might weigh in construing the meaning of the earlier enactment." *Id.* Consequently, the legislative history attached to the 1974 amendments does not justify reading Section 504 as anything more than it appears on its face to be, *i.e.*, an expression of a nondiscrimination policy with respect to the allocation of the benefits of federal funding to the handicapped.

Indeed, a comparison of the language of Section 504 as enacted in 1973 with Title VI and Title IX shows that the only similarity between these statutes is limited to the language prohibiting discrimination. In both of those titles, Congress followed the prohibition of discrimination by recipients of financial assistance with a detailed section directing all federal agencies and departments which disburse federal money to issue regulations. 42 U.S.C. § 2000d-1; and 20 U.S.C. § 1682. Section 504 contains no such direction. Furthermore, unlike Section 504, Titles VI and IX both provide for presidential review of the regulations and compliance with

them by termination of federal funds or by other means authorized by law. *Id.* Finally, those titles provide for judicial review of agency action against recipients by any aggrieved person pursuant to the procedures of the Administrative Procedures Act. 42 U.S.C. § 2000d-2, and 20 U.S.C. § 1683. Again, Section 504 contains no such provision.

Even if Congressional intent could be gleaned from the 1974 committee report, it at most shows that Congress intended the enforcement provision of Section 504 to be patterned after existing Title VI and Title IX regulations, which neither provide for nor contemplate a private cause of action. There is no indication in the report that Congress assumed that Title VI created a private remedy or evidence in the legislative history that any Member of Congress voted in favor of either the 1973 statute or the 1974 amendments in reliance of an understanding that Title VI provided a private remedy.[5]

Furthermore, a conclusion that there is a private right of action under Sections 504 is not justified by the following sentence in the 1974 Senate report:

> This approach to implementation of section 504, which closely follows the models of Title VI and Title IX, would ensure administrative due process (right to hearing, right to review), provide for administrative consistency within the Federal government as well as relative ease of implementation, and permit a judicial remedy through a private action. S. Rep. No. 93-1297 at 39-40.

The *Lloyd* court—the only court to construe this sentence—stated that this phrase "contemplates judicial re-

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[5] This Court has never explicitly held that Title VI contemplates a private right of action and Amicus believes there is none for reasons well-stated in Justice White's dissenting opinion in *Cannon*, 99 Sup. Ct. at 1968-1974 (White, J. and Blackmun, J., dissenting); and separate opinion in *University of California Regents* v. *Bakke*, 438 U.S. 265, 379 (1978) (separate opinion of White, J.).

view of an administrative proceeding as contradistinct from an independent cause of action in federal court. . . ." 548 F.2d at 1286. The entire passage from the Senate report can be considered nothing more than a directive to HEW and other administrative agencies to enforce Section 504 as HEW was already enforcing Title VI and Title IX. If HEW, for example, should arbitrarily and capriciously abuse its enforcement powers, an aggrieved recipient of federal financial assistance would clearly be entitled to obtain judicial review of agency action, the "judicial remedy through a private action" contemplated by Congress. The defendant in such an action would be HEW, not the recipient of federal funds, and review would be limited to the administrative record, to determine whether the agency's action was arbitrary or capricious or unsupportable by substantial evidence on the record as a whole. *See Camp* v. *Pitts*, 411 U.S. 138 (1973); *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971).

Nor can the Seventh Circuit's statement in *Lloyd* that, in the circumstances prevailing at the time of that decision, "there can be no objection to an independent cause of action in the federal courts," 548 F.2d at 1286, fairly be read to support such a private cause of action today. For the court specifically noted, in reaching that conclusion, that at the time of its decision there did not exist administrative remedial machinery under Section 504. Significantly, however, the Seventh Circuit "expressly reserved the question of whether a private right of action would still be available after final regulations were promulgated." *Simpson*, 629 F.2d at 1230. *See Lloyd*, 548 F.2d at 1286 n.29.

Although not explicitly authorized by Section 504 until the passage of the 1978 amendments to the Rehabilitation Act (discussed below), at least 11 federal agencies including HEW have issued virtually identical Section 504 regulations. Consequently, as a result of Executive

Order 11914 (41 Fed. Reg. 17871), which authorized HEW to coordinate the implementation of Section 504 by all federal departments and agencies, there now exists a uniform regulatory framework for Section 504.[6] There now being a consolidated enforcement program under Section 504, "the judicial remedy available must be limited to post-administrative remedy judicial review." *Lloyd*, 548 F.2d at 1286 n.29.

2. *The 1978 Amendments.*

The legislative history of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978[7] likewise confirms that alleged discriminatees may not enter federal court except to seek review of adverse administrative action pursuant to the Administrative Procedure Act. As with the original Act in 1973, the principal thrust of the 1978 amendments was to expand vocational rehabilitation, research, training, and construction programs and, additionally, to create a permanent authorization of appropriations for the basic federal-state vocational rehabilitation program. 29 U.S.C. § 701. Unlike in 1974, some of the amendments affected Section 504.

Section 504 was amended to authorize agency heads to promulgate agency regulations. In this respect, Section 504 now parallels Section 503, as enacted in 1973, because both now require implementing regulations and administrative enforcement.[8] Congress also added a

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[6] On November 2, 1980, HEW's coordination function was transferred to the Department of Justice by Executive Order 12250, 45 Fed. Reg. 72995 (November 4, 1980), which is now authorized to coordinate the implementation and enforcement of Title VI, Title IX, Section 504, and any other law which precludes discrimination in programs receiving federal financial assistance.

[7] P.L. 95-602, 92 Stat. 2955, 2982, 2984.

[8] Because Section 503 as enacted contained an administrative enforcement scheme, courts have viewed this express remedy as a

new Section 505, which explicitly grants a private right of action to alleged victims of handicap discrimination in federal employment under Title VII of the Civil Rights Act of 1964, but then rejects that approach for Section 504 complainants by specifying that the "remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964" apply to Section 504 violations. 92 Stat. 2982. By doing so, Congress was merely codifying the HEW regulation, 45 C.F.R. § 84.61, which made available to Section 504 complainants the "remedies, procedures and rights" of Title VI—which, again, do not provide for or contemplate a private cause of action for alleged victims of discrimination directly against alleged violators.[9] That Section 505 authorizes discretionary awards of attorney's fees to the prevailing party, other than the United States "in any action or proceeding to enforce or charge a violation of" Section 504, does not indicate that Congress intended a private right of action. Rather, this provision applies to ad-

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strong indication that Congress did not intend to provide a private judicial remedy as well under Section 503. *See, e.g., Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. 200, 203 (N.D. Texas 1977), *aff'd*, 611 F.2d 1074 (5th Cir. 1980); *Anderson* v. *Erie Lackawanna Ry. Co.*, 468 F.Supp. 934, 938-39 (N.D. Ohio 1979); and *Wood* v. *Diamond State Telephone Co.*, 440 F.Supp. 1003, 1009 (D. Del. 1977).

[9] "Obviously, when Congress wished to provide a private . . . remedy [under the Rehabilitation Act], it knew how to do so and did so expressly." *Touche Ross*, 99 Sup. Ct. at 2487. In view of the express judicial remedy provided in Section 501 and the express administrative remedy provided in Section 504, "it is highly improbable that Congress absentmindedly forgot to mention an intended private action" for Section 504. *Transamerica*, 100 Sup. Ct. at 247, *citing Cannon*, 99 Sup. Ct. at 1981 (Powell, J., dissenting).

This Court has refused to infer private rights of actions where administrative or like remedies are expressly available. *See, e.g., National Railroad Passenger Corp.* v. *National Assn. of Railroad Passengers*, 414 U.S. 453 (1974). *See also Transamerica Mortgage Advisors*, 100 Sup. Ct. at 247 ("where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.").

ministrative proceedings pursuant to the incorporated Title VI regulations, together with the limited judicial review authorized by Title VI itself, 42 U.S.C. § 2000d-2. Like the portion of the legislative history of the 1974 amendments which was construed by the Seventh Circuit in *Lloyd*, these provisions of the 1978 amendments contemplate "judicial review of an administrative proceeding as contradistinct from an independent cause of action in federal court." 548 F.2d at 1286.[10]

Nothing in the legislative history of the 1978 amendments indicates otherwise. The floor statements of Senators Cranston,[11] Stafford,[12] and Bayh,[13] the committee reports,[14] and the conference reports[15] indicate no more than the amendments to Title V of the Rehabilitation Act contemplate a right to seek judicial review of administrative action.[16] Significantly, Senator Cranston

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[10] *See Rogers* v. *Frito-Lay, Inc.*, 611 F.2d 1074, 1082 (5th Cir. 1980) ("[I]t does not necessarily follow that the [attorney's fees] amendment is intended to authorize private individuals to file civil actions"); *Cf. Simpson* v. *Reynolds Metals Co.*, 629 F.2d at 1243 ("We are left without any indication that, contemporaneous with its adoption of § 503, Congress intended to extend a private remedy").

[11] 124 Cong. Rec. S15590-91, 15593 (daily ed. September 20, 1978); and *Id.* at S19001 (daily ed. October 14, 1978).

[12] 124 Cong. Rec. S18999-S19000 (daily ed. October 14, 1980).

[13] 124 Cong. Rec. S15593 (daily ed. September 20, 1980). In all of the court cases relied on by Senator Bayh, none explicitly held that a private right of action was available under Title VI, and 42 U.S.C. § 1983 provided an alternative and express cause of action in those cases.

[14] S. Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

[15] H. Rep. No. 95-1780, Conf. Rep., 95th Cong., 2d Sess. (1978) *as reported in* 124 Cong. Rec. H 12720 (daily ed. October 12, 1978).

[16] To the extent that the remarks of the three Senators seem to indicate that the 1978 Attorney's fees provision reflects Congress' original intent that Section 504 included a private right of action, this Court placed little weight on such subsequent legislative history

clearly distinguished the provisions of the amendments applicable to Section 504 from those applicable to Section 501, which explicitly extended Title VII rights, remedies and exhaustion requirements to qualified federal employees who are victims of handicap discrimination.[17] Moreover, the House Conference Report, which accepted the Senate's proposals concerning attorney's fees and the applicability of Title VI rights, remedies and procedures to Section 504, also unequivocally differentiated between the private right of action available to federal employees and the procedures available to aggrieved handicapped under Section 504.[18] Given the proximity of Section 501 to Section 504, the conclusion is inescapable—Congress obviously knew how to create an independent judicial remedy for persons covered by Section 504, but failed to do so, just as it has so often in the past rejected similar proposals in the form of amendments to Title VII. See Appendix A. *See Rogers* v. *Frito-Lay, Inc.*, 433 F. Supp. 200, 202 (N.D. Tex. 1977).

In sum, there is no evidence whatsoever in Section 504's history of a Congressional intent to provide for the type of private suit for injunctive relief which the court of appeals permitted in this case. Congress intended to foreclose private litigation about alleged handicap discrimination by recipients of federal financial assistance until a final agency determination has been made. Con-

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relating to the effect of the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988, on a similar right under Title IX. *Cannon*, 99 Sup. Ct. at 1952 n.7. *See also Southeastern Community College*, 99 Sup. Ct. at 2370 n.11. See p. 6, *supra*. It is significant to note, moreover, that, unlike Title IX, Section 504 did not contain a provision for the award of attorney's fees contemporaneous with passage of the Act. *See Cannon*, 99 Sup. Ct. at 1958-59 & n.25.

[17] *Compare* 124 Cong. Rec. S15591 *with* S15593 (daily ed. September 20, 1978).

[18] 124 Cong. Rec. H12720 (daily ed. October 12, 1978).

gress is entitled to assume that the judiciary will recognize the "balance, completeness, and structural integrity" of its statutes and abstain from interference with the "careful blend of administrative and judicial enforcement powers" [19] contained in Title VI and incorporated by reference into Section 504. This Court has never demanded that Congress insert into a statute or its legislative history a sentence to the effecvt that "no court shall imply any additional remedies hereunder" as a precondition to its refusal to "expand the coverage of the statute to subsume other remedies." [20]

B. Implication of a Private Right of Action Under Section 504 Would Interfere With the Legislative Purpose of the Rehabilitation Act.

It is important to view Section 504 within "the context of the entire legislative scheme" [21] of the Rehabilitation Act of 1973, as amended. As previously noted, as enacted in 1973, the Rehabilitation Act was nothing more than a massive appropriations bill designed to improve the delivery of vocational rehabilitation services. In contrast, to the legislative histories associated with Title VI and IX, there were no legislative findings regarding discrimination with respect to the handicapped. Although not specifically required by the Act, an administrative enforcement mechanism was established, which was codified by the 1978 amendments. Thus, in 1978 the primary jurisdiction over enforcement of Section 504 was committed, not to the courts, but to federal agencies which Congress presumed had developed the expertise to prevent discrimination against qualified handicapped persons.

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[19] *See Brown* v. *GSA*, 425 U.S. 820, 883 (1976).

[20] *National Railroad Passenger Corp.* v. *National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974).

[21] *Morris* v. *Gressetle*, 432 U.S. 491, 501 (1977), *citing Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).

Clearly, the legislative purpose of Section 504 is better served by agency enforcement, and judicial review of agency action, than by private suits. Unlike race, color, national origin, or sex discrimination, which are addressed in Title VI and Title IX, "handicapped discrimination" is not susceptible to precise categorization. It is different in kind and does not necessarily have the same effect on equal opportunity as with other forms of discrimination. Former HEW Secretary Matthews explained the unique definitional problems in a letter accompanying the publication of the initial proposed Section 504 regulations of HEW:

> Section 504, however, differs conceptually from both titles VI of the Civil Rights Act of 1964 and IX of the Education Amendments of 1972. The premise of both title VI and title IX is that there are no inherent differences or inequalities between the general public and the persons protected by these statutes and, therefore, there should be no differential treatment in the administration of Federal programs. The concept of section 504, on the other hand, is far more complex. Handicapped persons may require different treatment in order to be afforded equal access to federally assisted programs and activities, and identical treatment may, in fact, constitute discrimination. The problem of establishing general rules as to when different treatment is prohibited or required is compounded by the diversity of existing handicaps and the differing degree to which particular persons may be affected. Thus, under section 504 questions arise as to when different treatment of handicapped persons should be considered improper and when it should be required. 41 Fed. Reg. at 20296 (1976).

Thus, determinations of handicapped discrimination involve the resolution of two significant threshold issues not present in resolving discrimination complaints under Title VI and Title IX: (1) the determination of who meets

the statutory definition of a "handicapped individual," [22] and (2) the determination of when equal treatment violates the statute. Because the answers to these questions are novel and complex, judicial implication of a private right to sue under Section 504 would defeat the legislative purpose that before federal courts become involved, the administrative agencies should be given an opportunity to apply their expertise to these issues in the context of remedying handicapped discrimination in programs for which they provide financial assistance. *Aircraft & Diesel Equipment Corp.* v. *Hirsch*, 331 U.S. 752, 767-68 (1947). This is no simple task.

While there may be no difficulty in determining if a person is a "handicapped individual" under the Act if their impairment involves, for example, blindness or a mobility handicap, less disabling impairments present problems in terms of whether the statutory definition of "handicapped individual" is met. For example, administrators and judges have been struggling for years with definitions of disability in cases arising under the Social Security Act.[23] The extreme difficulty in determining who is disabled, and to what extent, are illustrated by the conflicting medical testimony in a myriad of cases involving disability benefits, personal injuries, and workmen's compensation. *See, e.g.*, *LeMaster* v. *Weinberger*, 533 F.2d 337 (6th Cir. 1976) (conflicting testimony as to whether claimant had or was disabled by multiple sclerosis); *see also*, Liebman, *The Definition of Disability in Social Security and Supple-*

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[22] The definition of "handicapped individual" found in Section 706(7) of the Act is set forth in Appendix B.

[23] Only those persons who cannot perform any job anywhere in the National economy are disabled for purposes of the Social Security Act. 42 U.S.C. § 423(d)(2)(A). The disabling physical or mental impairment must be medically demonstrable. 42 U.S.C. § 423(d)(3).

mental Security Income: Drawing the Bounds of Social Welfare Estates, 89 Harv. L. Rev. 833 (1976).

Likewise, the problems involving application of the statute to "handicapped individuals" are equally difficult, requiring an administrative assessment before judicial review. Handicaps differ widely in kind and degree, and there is no readily identifiable and homogeneous class of handicapped persons. Nor is there a class of non-handicapped persons with whom treatment of handicapped persons can be compared. The Rehabilitation Act's definition of the handicapped, 29 U.S.C. § 706(7), is so broad that allegations of discrimination could not be restricted to readily identifiable classes of persons but undoubtedly would encourage complaints based upon disparate treatment of differently and uniquely handicapped individuals. This analysis becomes hopelessly complex because there is no fixed reference class with which treatment of others can be compared.

Although Congress chose to use the same term "discrimination"—as is found in Title VI and Title IX, Congress showed its caution by limiting the application of Section 504 to "otherwise qualified handicapped individuals" who face disparate treatment "solely" on the basis of handicap. Furthermore, Congress has consistently rejected attempts to amend Title VII, which does include an explicit private right of action, 42 U.S.C. § 2000e-5(g), to add handicap as a prohibited ground of discrimination. See Appendix A. Significantly, by incorporating the procedures and remedies of Title VI, with their explicit exclusion of employment practices from coverage except for federally subsidized jobs programs, Congress has shown in particular that it did not want employment discrimination lawsuits to arise under Section 504.[24] In

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[24] *See Trageser* v. *Libbie Rehabilitation Center, Inc.*, 590 F.2d 87, 89 (4th Cir. 1978), *cert. denied*, 99 Sup. Ct. 2895 (1979); *Carmi* v. *Metropolitan St. Louis Sewer District*, 620 F.2d 673, 674-

addition, the courts have been particularly adverse to implication of private judicial remedies in matters involving employment practices under federal statutes and executive orders.[25] Judicially created employment litigation under the Rehabilitation Act would present, in the words of the court in *Lloyd*, "the unseemly vista of a spotty application of ad hoc remedies in lawsuits in various regions of the country." 548 F.2d at 1286. In view of the cautious approach of Congress in this new area, and because Congress chose to establish an administrative scheme for handling these claims, rather than to provide for private causes of action, this Court should not create a direct judicial forum for resolving these complicated problems.[26]

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75 (8th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3231 (U.S. 1980); *Simpson*, 629 F.2d 1226, 1234-35 (7th Cir. 1980); *Brinkley* v. *Department of Public Safety*, 22 FEP Cases 164, 165-66 (N.D. Ga. 1980); and *Proffit* v. *Consolidation Coal Co.*, 21 FEP Cases 382 (S.D. W.Va. 1979). *Contra*, *Hart* v. *County of Almeda*, 21 FEP Cases 233 (N.D. Calif. 1979).

[25] *See, e.g.*, the cases collected in *Rogers* v. *Frito-Lay, Inc.*, 433 F.Supp. at 202 n.1.

[26] Although the question of whether Section 504 contains a private right of action was argued by the petitioner and respondent in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. at 2366 n.5, the Court declined to rule on the question because of its disposition of the case on the merits. Consequently, the fact that this Court two years earlier vacated the judgment and remanded a Section 504 case to the district court in *Campbell* v. *Kruse*, 434 U.S. 808 (1977) "to decide the claim based on" Section 504 does not "acknowledge the judicial authority to entertain private suits for injunctive relief under Section 504" as held by the Court below. (Pet. App. A-7, footnote omitted.)

II. ANY IMPLIED JUDICIAL REMEDY UNDER SECTION 504 SHOULD BE CAREFULLY CIRCUMSCRIBED.

A. Section 504 Applies Only to Programs Receiving Federal Financial Assistance, and Not to Other Activities Administered by the Recipient.

Pursuant to the 1978 amendments to the Rehabilitation Act, only the remedies, procedures, and rights under Title VI are available to complainants under Section 504. The legislative history of Title VI clearly demonstrates that it was program specific; that is, Title VI's provisions applied only to the program receiving the financial assistance. *See* Kuhn, *Title IX: Employment and Athletics are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 50-54, 65-67 (1976).

As the 1964 Civil Rights Act worked its way through the House and Senate, the question frequently arose as to whether assistance to one program could be cut off because of a finding of discrimination in another. The Administration's cabinet-level representatives consistent answer was that it could not.[27] A reading of the floor debates on Title VI in both Houses, moreover, reinforces the conclusion that under no circumstances would discrimination in one program justify action with respect to any other program.

The Senate floor leader for Title VII emphasized that "[p]articipation in one program would not justify the

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[27] *See, e.g., Hearings on Civil Rights Before Subcomm. No. 5 of the House Comm. on the Judiciary*, ser. 4, pt. II, 88th Cong., 1st Sess. 1543 (1963) (colloquy between Representative Meader and HEW Secretary Celebreeze that the withholding of funds from one program cannot be used as a means of combatting discrimination in another program); *Hearings on H.R. 7152, As Amended by Subcomm. No. 5, Before the House Comm. on the Judiciary*, ser. 4, pt. IV, 88th Cong., 1st Sess. 2766 (1963) (Attorney General Kennedy indicated that the termination of assistance be limited to the particular *program* and *location* where the discrimination exists).

exaction of a non-discrimination assurance concerning some other program." [28] Similarly, Senator Ribicoff, one of the two authors of the version of Title VI passed by the House, pointed out that "[u]nder no circumstances" would discrimination in one program justify any action with respect to any other program.[29] These repeated assurances that assistance in one program could not be terminated because of a finding of discrimination in another program were made prior to the inclusion in Title VI of the so-called "pin-point" termination provision found in Section 602, 42 U.S.C. § 2000d-1, which limits any termination of federal assistance to the "particular program, or part thereof," in which the discrimination is found.

When the final version of the 1964 Civil Rights Act was proposed in the Senate, Title VI contained the program specific provision. As explained in the Senate debates, "[t]he new language will ensure that Federal funds will be cut off for only those political entities or particular programs or parts of programs in which discrimination is practiced." [30] Moreover, Senator Humphrey, floor leader for the Civil Rights Act, stated that the revisions clarified that "any termination shall affect only the particular program, or part thereof," in which discrimination occurs.[31] Finally, House Judiciary Chairman Celler confirmed Senator Humphrey's interpretation when he appeared before the House Rules Committee to describe the Senate amendments to the Bill, stating that "aid to a particular program, will not be cut off because one part of the program or institution is being operated in violation of the law." [32]

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[28] 110 Cong. Rec. 7059 (1964) (remarks of Senator Pastore).

[29] *Id.* at 7067 (remarks of Senator Ribicoff).

[30] *Id.* at 12689 (remarks of Senator Saltonstall).

[31] *Id.* at 12714-15 (remarks of Senator Humphrey).

[32] *Hearing on H. Res. 789 Before the House Comm. on Rules*, 88th Cong., 2d Sess. 6 (1964).

This view of legislative history of Title VI has been affirmed by the courts. In *Bd. of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), the Fifth Circuit held that programs could not be condemned by association. The court refused "to assume, contrary to the express mandate of [the statute], that defects in one part of the school system automatically infect the whole." 414 F.2d at 1074. Thus, funds under Title VI are not to be denied or terminated in a federally assisted program unless there is an express finding of discrimination in a particular program. *Accord, Gatreaux* v. *Romney*, 457 F.2d 124, 128 (7th Cir. 1972) (federal assistance to model cities program unrelated to housing cannot be terminated because of discrimination in a low-rent housing program).

The legislative history and the decisions of the courts makes clear, therefore, what is evident from the statutory language—federal assistance to program "A" cannot be terminated because of a finding of discrimination in program "B". As a corollary, a remedy for the aggrieved is not available unless it is proven that the complainant participated in a program which received federal financial assistance and was the intended beneficiary of that assistance. *Carmi*, 620 F.2d at 674-75 & n.4. These Title VI standards apply to Section 504 by virtue of the 1978 amendments to the Rehabilitation Act. *Id.*, and *Simpson*, 629 F.2. at 1234. Consequently, to have standing under Section 504, the plaintiff must plead and prove as a jurisdictional prerequisite that the particular activity he participated in received federal financial assistance and that he was the intended beneficiary of that assistance. *Id.*[33] In the instant matter, the stipulated

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[33] The program specific nature of rights and remedies under Section 504 is most clearly shown with respect to employment. Section 604 of Title VI, which is incorporated by reference into Section 504, explicitly excludes employment practices of recipients except in federally-subsidized jobs programs. 42 U.S.C. § 2000d-3 (1970). *See United States* v. *Jefferson County Bd. of Educ.*, 372

facts show only that the defendant university was a recipient of federal assistance but do not specify that the plaintiff participated in a program receiving such assistance.

B. The Complainant Must Exhaust Available Administrative Remedies With the Department of Health, Education, and Welfare Before Filing Suit in Federal Court.

It is well-established that a suit may not be brought under Title VI—the statute which determines the rights and remedies under Section 504—without exhausting administrative remedies under 42 U.S.C. § 2000d-2. *See Green Street Association* v. *Daley*, 373 F.2d 1, 8-9 (7th Cir.), *cert. denied*, 387 U.S. 932 (1967).[34] The Title VI exhaustion requirement applies both to alleged victims of discrimination, as in the cases above, and to alleged violators of the statute, as in *School District of City of Saginaw, Michigan* v. *HEW*, 431 F. Supp. 147 (E.D. Mich. 1977). Under Section 504, exhaustion has been required before seeking court review. *See Neal* v. *U.S. Postal Service*, 468 F.Supp. 958 (D. Utah 1979); *Doe* v. *New York University*, 442 F.Supp. 522, 523 (S.D.N.Y.

F.2d 836, 882-83 (5th Cir. 1966), *decree corrected on rehearing*, 380 F.2d 385 (en banc), *cert. denied*, 389 U.S. 840 (1967). Moreover, the three courts of appeals which have examined the relationship between the rights and remedies under Section 504 and Title VI have concluded that an action to redress employment discrimination may not be maintained unless a primary objective of the federal financial assistance is to provide employment. *See Trageser*, 590 F.2d at 89; *Carmi*, 620 F.2d at 674-75; and *Simpson*, 629 F.2d at 1227.

[34] *See also Cave* v. *Beame*, 433 F.Supp. 172, 174 (E.D.N.Y. 1977); *Johnson* v. *County of Chester*, 413 F.Supp. 1299, 1310-11 (E.D. Pa. 1976); *Green* v. *Cauthen*, 379 F.Supp. 361, 378 (D.S.C. 1974); *Feliciano* v. *Romney*, 363 F.Supp. 656, 672-73 (S.D.N.Y. 1973); *Dupree* v. *City of Chattanooga*, 362 F.Supp. 1136, 1141-42 (E.D. Tenn. 1973).

1978); and *Davis* v. *Bucher*, 451 F.Supp. 791 (E.D. Pa. 1978). *But see Whitaker* v. *Board of Higher Education of New York*, 18 FEP Cases 906 (E.D.N.Y. 1978); and *Hart* v. *County of Alameda*, 21 FEP Cases 233 (N.D. Calif. 1979).

Furthermore, the complainant must fully exhaust administrative remedies. It is not sufficient, as here, that a complaint has been filed with HEW. As this Court held in *Aircraft & Diesel Equipment Corp.*, 331 U.S. at 767-68 (1974):

> The doctrine of exhaustion of administrative remedies, whereever applicable, does not require merely the initiation of prescribed administrative procedures. It is one of exhausting them, that is, pursuing them to their appropriate conclusion and, correlatively, of awaiting their final outcome before seeking judicial intervention.
>
> The very purpose of providing either an exclusive or an initial and preliminary administrative determination is to secure the administrative judgment either, in the one case, in substitution for judicial decision or, in the other, as foundation for or perchance to make unnecessary later judicial proceedings. Where Congress has clearly commanded that administrative judgment be taken initially or exclusively, the courts have no lawful function to anticipate the administrative decision with their own, whether or not when it has been rendered they may intervene either in presumed accordance with Congress' will or because, for constitutional reasons, its will to exclude them has been exerted in an invalid manner. To do this not only would contravene the will of Congress as a matter of restricting or deferring judicial action. It would nullify the congressional objects in providing the administrative determination. In this case these include securing uniformity of administrative policy and disposition, expertness of judgment, and finality in determination, at least of those things which Congress intended

to and could commit to such agencies for final decision. (Footnote omitted [35])

Moreover, courts should be, and have been, reluctant to find relatively new administrative machinery insufficient before it has had a chance to prove its adequacy. *See Doe* v. *New York University*, 442 F.Supp. at 523, and *Rogers* v. *Frito-Lay*, 433 F.Supp. at 203.[36]

The need for agency investigation and determination is compelling in the field of handicap discrimination under Section 504 of the Rehabilitation Act. As former HEW Secretary Matthews stressed, handicap discrimination is "far more complex" than the discrimination prohibited by Title VI and Title IX.[37] As an agency which has had substantial experience administering programs for the rehabilitation of handicapped individuals, HEW is better equipped than the federal courts to make the initial investigation of complex factual situations and to formulate a consistent approach to handicap dis-

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[35] These policies were further explained and summarized in *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *McGee* v. *United States*, 402 U.S. 479, 484-85 (1971), and *McKart* v. *United States*, 395 U.S. 185 (1969).

[36] In view of Congress' desire that Section 503 and 504 be administered in a uniform and consistent manner, the fact that HEW's administrative procedures do not allow the complainant to participate in the investigation or subsequent enforcement proceedings should not be determinative of the exhaustion question as it was in *Cannon* (99 Sup. Ct. at 1961-62 n.41). *See* S. Rep. No. 93-1297 at 39-40; and 120 Cong. Rec. 30551 (1974) (remarks of Senator Stafford). There being no statutory preclusion to the complainant's participation in the administrative process, the administrative procedures adopted by HEW should not undercut the clear Congressional intent that there be a right to a hearing, a right to review and exhaustion of the administrative process before a limited right action can be initiated. See p. 7, *supra*. *Cf. Mohasco Corporation* v. *Silver*, 100 Sup. Ct. 2486, 2496 (1980) (Administrative interpretation or regulation "cannot supersede the language chosen by Congress.")

[37] 41 Fed. Reg. at 20296; *see* p. 14, *supra*.

crimination problems. Thus, exhaustion of administrative remedies should be required under Section 504 as well, with judicial review limited to such questions as whether HEW exceeded its statutory authority or abused its discretion.[38]

III. SECTION 504 IS A NONDISCRIMINATION STATUTE AND DOES NOT IMPOSE ANY OBLIGATION TO UNDERTAKE POSITIVE STEPS TO ACCOMMODATE "OTHERWISE QUALIFIED HANDICAPPED" INDIVIDUALS.

Section 504 merely requires that recipients of federal financial assistance not discriminate against otherwise qualified handicapped individuals solely on the basis of their handicap. By its terms Section 504 does not contain any requirement to accommodate the needs of an "otherwise qualified handicapped individual." *See Carmi* v. *St. Louis Sewer District*, 20 FEP Cases 162, 164 (E.D. Mo. 1979). Indeed, to be "otherwise qualified" implies the absence of need for any accommodation. Congress' use of this terminology shows that it intended only to

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[38] Alternatively, the complainant should be required to pursue his claims with HEW pursuant to the doctrine of primary jurisdiction. *See Crawford* v. *University of North Carolina*, 440 F.Supp. 1047 (M.D.N.C. 1977). Under the doctrine, whether the agency is an expert or not, a court normally should not act upon subject matter that is peculiarly within the agency's specialized field, without considering the results of the administrative process for otherwise parties who are subject to the agencies continuous regulation may become the victims of uncoordinated and conflicting requirements. *See* Jaffe, *Primary Jurisdiction*, 77 Harv. L. Rev. 1037 (1964); and *Federal Maritime Board* v. *Ibrandtsen*, 356 U.S. 481, 498-99 (1958). "Court jurisdiction is not thereby ousted, but only postponed." *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 353 (1963). This doctrine has been applied to Section 504 claims by at least one district court in *Crawford* and is particularly appropriate to the complex area of handicap discrimination. *Cf. Drennon* v. *Philadelphia General Hospital*, 428 F.Supp. 809 (E.D. Pa. 1977) (Doctrine of primary jurisdiction applies to Section 503).

eliminate practices that exclude handicapped persons who are fully capable of participating in a program without accommodation. HEW, however, has promulgated a regulation under Section 504 which purports to impose such a requirement on recipients with respect to their employment practices, 45 C.F.R. § 84.12, and a number of other regulations, *e.g.*, 45 C.F.R. § 84.22 (modification of existing facilities), § 84.23 (new construction), and § 84.44 (d) (auxiliary aids), which will require, according to HEW's own estimate, an expenditure of at least $3.2 *billion* annually on behalf of handicapped individuals by institutions which participate in federally-funded programs.[39] Such expenditures would require recipients of federal financial assistance to provide services, including interpreter services, which Congress designated to be provided by state agencies under the Act. 29 U.S.C. §§ 720(a), 723(6). Private entities such as the University herein receive no funds to provide such services. Instead of placing the burden on recipients, the Act as amended in 1978 specifies that "[comprehensive rehabilitation] centers shall provide . . . [to entities such as the University] such technical assistance (including support personnel such as interpreters for the deaf) as may be necessary . . . in complying with . . . the requirements of section [504]. . . ." 29 U.S.C. § 775. Thus, on the basis of a one-sentence statute prohibiting "discrimination," HEW has mandated extremely expensive preferential treatment that is inconsistent with the allocation of responsibilities under the Rehabilitation Act.

None of these regulations requiring accommodation including those for auxiliary aide is authorized by the

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[39] *See* O'Neill, Discrimination Against Handicapped Persons—The Costs, Benefits and Economic Impact of Implementing Section 504 of the Rehabilitation Act Covering Recipients of HEW Financial Assistance (May 4, 1977) (unpublished report prepared for the HEW Office for Civil Rights under Orders #SA-4141-76 and #SA-2471-77), p. 55.

statute. To the extent that such "accommodation" would cause a recipient to incur more than a negligible expense, the requirement is preferential rather than nondiscriminatory. HEW's regulations thus not only exceed the statute's mandate; they violate it. These regulations unlawfully attempt to bootstrap a failure to make preferential accommodations into discrimination—whereas, in the absence of a finding of illegal discrimination, there cannot possibly arise any statutory duty to implement preferential remedies.[40]

Recognizing the problems associated with HEW's interpretation of a recipient's obligations under Section 504, this Court in *Southeastern Community College* v. *Davis*, 99 Sup. Ct. 2361, 2369-70 (1979), found that "neither the language, purpose, nor history of § 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds." (Footnote omitted.) Specifically, with regard to HEW's accommodation regulations, the Court stated:

> If these regulations were to require substantial adjustments in existing programs beyond those necessary to eliminate discrimination against otherwise qualified individuals, they would do more than clarify the meaning of § 504. Instead, they would constitute unauthorized extension of the obligations imposed by the statute. 99 Supp. Ct. at 2369.

Moreover, the Court distinguished the requirements of Sections 503 and 504:

> The language and structure of the Rehabilitation Act of 1973 reflect a recognition by Congress of the distinction between the evenhanded treatment of qualified handicapped persons [Section 504] and af-

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[40] *Cf. Furnco Construction Corporation* v. *Waters*, 438 U.S. 567, 577-78 (1977) ("Title VII forbids the employer from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees.").

> firmative efforts to overcome the disabilities caused by handicaps [Section 503]. *Id.*
>
> * * * *
>
> A comparison of these provisions demonstrates that Congress understood accommodation of the needs of handicapped individuals may require affirmative action and knew how to provide for it when it wished to do so. *Id.* (footnote omitted.)

Noting that the line between affirmative action and discrimination may not always be clear, the Court went on to say that sorting out the instances involving one or the other will "be an important responsibility of HEW." *Id.* at 2370. Because HEW has ignored this responsibility and has not modified its accommodation regulations since this Court's decision in *Southeastern Community College*, those regulations now are entitled to even less deference for they clearly are in conflict with the guidance established by the Court. The clear meaning of Section 504 is to prohibit discrimination and not to mandate accommodation. Section 504 contains no language which would require the estimated $3.2 billion annual expenditure which HEW seeks to impose on recipients.

This Court previously construed a requirement of reasonable accommodation for religious practices imposed by the 1972 amendments to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(j), in *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977). Even in that context, where (unlike the situation under Section 504) Congress clearly placed a reasonable accommodation burden on employers, this Court held that an employer need not incur more than a *de minimis* cost to accommodate the employee's religious practice. Anything beyond that would be unreasonable, or, differently stated, would constitute an undue hardship on the employer.[41]

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[41] *See also Upshur* v. *Love*, 20 FEP Cases 638, 645 (N.D. Calif. 1976) (Hiring an aide to assist blind teacher to perform adminis-

In *Hardison*, this Court questioned whether, prior to the 1972 amendments, the EEOC had authority to issue a "reasonable accommodation" regulation at all under Title VII's mere prohibition of discrimination on the basis of religion. 432 U.S. at 76 n.11 (1977). Thus, insofar as HEW's regulations purport to require such accommodations or expenditures or other "affirmative conduct," they exceed HEW's authority and cannot be relied upon to support the decision below.

The Rehabilitation Act of 1973, as amended, is not a civil rights statute but rather a massive appropriations law aimed both at subsidizing handicapped—especially severely handicapped—individuals and developing new programs to assist in their integration into society. There is no indication in the text or legislative history of the Rehabilitation Act or its two amendments that anyone other than the federal government must bear the expense for these subsidies and programs. It is inconceivable that by including the one-sentence policy statement of Section 504, Congress intended *sub silentio* to impose on recipients of federal financial assistance (not ear-marked to pay accommodation costs) a multi-billion dollar burden [42] to restructure American educational and industrial facilities and practices to accommodate "otherwise qualified handicapped individuals." It likewise stretches credulity to believe that Congress also intended for all who fit within the definition of 29 U.S.C. § 706(7) to be able to use the federal courts to force recipients to make and bear the expense of such accommodations.

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trative duties exceeds nondiscrimination requirements of Section 504).

[42] *See* p. 25 & n.39, *supra*.

CONCLUSION

The decision of the court of appeals should be reversed and this Court's opinion should make it clear that Section 504 (1) does not give rise to a private right of action, (2) requires an otherwise qualified handicapped person to be an intended beneficiary of federal financial asistance and to have exhausted administrative remedies to have standing, and (3) does not impose an obligation to take positive steps to accommodate otherwise qualified handicapped individuals.

Respectfully submitted,

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APPENDIX A

Unsuccessful Attempts to Amend the Civil Rights Act of 1964 to Add Handicap as a Prohibited Ground of Discrimination

93d Congress (1973-74)

Bill	*Sponsor*
S. 1780	Pell
H.R. 1120	Roybal
H.R. 2685	Hicks
H.R. 10960	Tiernan
H.R. 11986	Hicks & 24 others
H.R. 11987	Hicks & 10 others
H.R. 12654	O'Brien
H.R. 12916	Moakley
H.R. 13199	Hicks & 21 others
H.R. 13200	Hicks & 18 others

94th Congress (1975-76)

Bill	*Sponsor*
S. 1311	Pell
S. 1757	Weicker
H.R. 1346	O'Brien
H.R. 1886	Matsunaga
H.R. 2515	Hicks
H.R. 3497	Roybal
H.R. 4624	Hicks & 23 others
H.R. 4625	Hicks & 24 others
H.R. 4626	Hicks & 6 others
H.R. 5016	Hicks & 8 others
H.R. 7061	Dodd
H.R. 7754	Hicks & 3 others
H.R. 7758	Lehman
H.R. 7946	Dodd & 4 others
H.R. 8028	Beard & 19 others
H.R. 8417	Beard & 5 others
H.R. 12591	Koch

95th Congress (1977-78)

Bill	*Sponsor*
S. 1477	Weicker
H.R. 264	Conte
H.R. 461	Le Fante
H.R. 1107	O'Brien
H.R. 1200	Rodino
H.R. 1995	Roybal
H.R. 3504	Edwards
H.R. 6619	Beard
H.R. 9477	O'Brien & 2 others
H.R. 9521	O'Brien & 15 others
H.R. 10198	O'Brien & 6 others

96th Congress (1979-80)

Bill	*Sponsor*
H.R. 373	Guyer
H.R. 609	O'Brien
S. 446	Harrison & 24 others

APPENDIX B

Definition of Handicapped Individual

(7) (A) Except as otherwise provided in subparagraph (B), the term "handicapped individual" means any individual who (i) has a physical or mental disability which for such individual constitutes or results in a substantial handicap to employment and (ii) can reasonably be expected to benefit in terms of employability from vocational rehabilitation services provided pursuant to subchapters I and III of this chapter.

(B) Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of [Sections 503 and 504], any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment. For purposes of Sections [503] and [504] of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others. 29 U.S.C. § 706(7), *as amended* by the Rehabilitation Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619, and *as amended* by the Rehabilitation, Comprehensive Services and Disabilities Amendments of 1978, Pub. L. 95-602, § 122(a), 92 Stat. 2984.